FIRST DIVISION
November 25, 2013

No. 1-11-2473

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CLYDE WILLIAMS, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County. No. 09 CH 20198 Honorable Stanley J. Sacks, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Connors and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 ***Held***: Defendant's conviction was affirmed over claims that trial court improperly admitted DNA evidence.

¶ 2 A jury convicted defendant of residential burglary and attempted sexual assault based almost entirely on DNA found in a sweatshirt left at the scene of the crime. The trial court sentenced defendant to concurrent sentences of 30 years' imprisonment for each crime. Finding no error in the admission of the DNA evidence, we affirm.

¶ 3 BACKGROUND

¶ 4 The convictions stem from events that occurred between the late evening of October 1,

2008 and the next morning. The complainant, C.T., testified that she was a college student living in a second-floor apartment with three roommates named Hannah, Crystal and Matt. Three of the roommates had individual bedrooms; the fourth slept in the den. About 12:30 a.m. on October 2, C.T. went to bed. Around 2 a.m., C.T. was roused from sleep and found a stranger lying next to her in bed. The room was lit only by the light from an outdoor streetlamp. She described the individual as a tall, African-American man wearing a baseball cap, white t-shirt and jeans. He was lying on his back on top of the bedcovers. The man told her to be quiet and then rolled on top of her. She testified that she started screaming, that he grabbed her right arm with his left hand, and then used his right hand to put a pillow over her face. As they struggled, the man reached for the waistband of her pajama pants, but was unable to pull them down. She escaped and ran into another bedroom where she told her roommate about the event. The two ran into the third bedroom, occupied by Matt, the only male roommate. Matt held the door secure until the police arrived.

¶ 5 When C.T. and the police officers went to her bedroom, she noticed a large gray sweatshirt[1] on the floor next to the bed. She had never seen the sweatshirt before. She also noticed that a back porch window was open and one of the stove burners was on. She and Hannah then went outside to a police car. Other officers brought a man to the front of the car and shined a light on him to determine if they could identify him as the attacker. She testified that she thought she told the officers that she was 85% sure than the man was her attacker. She also

[1] We refer to the item of clothing as a sweatshirt. However, the nomenclature in the record is inconsistent. Witnesses referred to it variously as a sweatshirt, a jacket, a sweatshirt jacket, and a hooded sweatshirt/jacket with trim.

noted similarities in race, height and clothing, particularly the white/gray underbill of his baseball cap. A year later, two detectives interviewed C.T. She told the detectives that the man put his hands between her legs, groped her vaginal area, and grabbed her wrists. At trial, she identified the sweatshirt and baseball cap, and provided an in-court identification of the defendant as her assailant.

¶ 6 C.T.'s roommate Matthew Elliot testified that he called 9-1-1 and secured his three roommates in his bedroom until the police arrived. He noticed a pile of electronic items that were near the back door near the kitchen and back staircase when he went to bed but had now been moved into the hallway. He also testified that the kitchen window had been closed or 90% closed before he went to bed. The sweatshirt did not belong to him.

¶ 7 Police Officer Gougis testified that C.T. directed his attention to the sweatshirt on her bedroom floor. He left the sweatshirt *in situ* and called for an evidence technician to preserve it. He also noticed that a small cart had been pushed away from a window in the kitchen. He obtained a description of the attacker and transmitted it on the police radio.

¶ 8 Sergeant Schmidt testified that while on patrol a few minutes earlier, he saw an adult black male riding at a high rate of speed on a sidewalk a few blocks away. He tried to conduct a field interview with the rider, but the rider became evasive and continued traveling despite the officer's attempt to intercept him. A few blocks later, the rider fell off the bicycle and Schmidt detained him. Only then did Sergeant Schmidt hear a description of the offender over the radio. He handcuffed the man, later identified as the defendant, put him in a squad car, and drove him to the apartment for identification. Schmidt came to the apartment building and conducted an in-

person identification with Gougis, the suspect and witnesses. He testified that C.T. identified the defendant as her assailant "based on the clothing." His written report indicated that the defendant was 6′6″ tall and weighed 200 pounds.

¶ 9 Officer Davis testified he was working as an evidence technician and arrived at the apartment about 3 a.m. He recovered the sweatshirt from the bedroom, placed it in an evidence bag, and then later placed the sealed bag into an evidence collection vault. Using what he testified were proper procedures for handling the sweatshirt at all times, he also inventoried it and eventually sent it to the Illinois State Police crime lab.

¶ 10 Illinois State Police forensic scientist Casey Karaffa testified without objection as an expert witness for the state. She began her examination of the evidence two months after the incident. She received both the sweatshirt and a buccal standard from C.T. in a sealed condition. She swabbed key areas of the sweatshirt to rub off cells or cellular material. Using standard scientific procedures, she placed the wet swab ends into tubes labeled with the case number, exhibit number, her initials and the date. She then placed the labeled tubes into a locked refrigerated laboratory area for future DNA analysis. She also returned the sweatshirt to a tagged and marked evidence bag. At trial, she identified the sweatshirt and testified that there was "a proper chain of custody maintained and documented at all times while this case was being worked with the Illinois State Police."

¶ 11 Illinois State Police forensic scientist Jennifer Bell testified without objection as an expert in DNA analysis. She stated that she received a sealed buccal swab from Williams bearing inventory number 11892212 and conducted a PCR/STR DNA analysis on it to obtain his DNA

profile. She also stated that the Illinois State Police has a contract with Orchid Cellmark (Cellmark) to process DNA evidence to reduce backlogs. She was asked to compare Williams's DNA with the DNA profile generated by Cellmark from a "jacket" in C.T.'s case. From the report and her own preparation of electropherograms, she determined that there was a mixture of two human donors' DNA on the jacket. The major profile was complete and that of a male; the minor one was incomplete and of unknown gender. She testified to a reasonable degree of medical certainty that the male major DNA profile on the jacket matched that of Williams, and that the DNA would be expected to occur in approximately 1 in 306 trillion black unrelated individuals. She testified that a proper chain of custody was maintained and documented at all times, and that all methods she used were generally accepted in the scientific community. On cross-examination, she admitted that if more of the sweatshirt had been swabbed, the donor of the minor profile might have became the major donor.

¶ 12 The parties stipulated that Manny Sanchez, a State's attorney's employee, obtained a buccal swab from the defendant. The stipulation specifically set forth that Sanchez then "sealed that swab and kept custody and control of that swab until it was picked up by Rodger Bresnahan." The stipulation concluded, "It was sealed and a proper chain of custody was maintained at all times." Immediately after the State's attorney concluded reciting that final phrase of the stipulation, and asked "So stipulated?" the defendant's attorney then said "So stipulated."

¶ 13 The second stipulation was that State's attorney investigator Rodger Bresnahan would testify that the same day Sanchez obtained the Williams buccal swab, Bresnahan "went to a

locker that was secured" and retrieved it and assigned it inventory number 11892212. The stipulation concluded, "He kept custody and control of that buccal swab, was sealed at all times, and then sent to the Illinois State Police Crime Lab. So stipulated?" The defendant's attorney responded, "So stipulated."

¶ 14 The jury found the defendant guilty on both counts. The trial court sentenced him to concurrent 30 year terms for each crime. This appeal followed.

¶ 15 On appeal, defendant contends that: (1) the admission of testimony from a forensic analyst who relied on a DNA report prepared by Cellmark, a nontestifying third-party analyst, violated his confrontation clause rights according to *Crawford v. Washington*, 541 U.S. 36 (2004); (2) the State failed to establish a chain of custody for the swabs from the sweatshirt sent to Cellmark for DNA testing; and (3) there was an insufficient foundation for the DNA results because of a lack of evidence that Cellmark employed measures to protect the tested samples against contamination.

¶ 16 ANALYSIS

¶ 17 As we noted earlier, the defendant's conviction hinges largely on the reliability of the DNA analysis of the sweatshirt found in the apartment. Defendant presents three reasons why the conviction should be reversed. Before we consider the merits of these arguments, we note that the State contends that the defendant forfeited each of them by failing to raise them below. The defendant concedes this, but argues that we should consider them under the plain error doctrine. Because we can easily resolve them in favor of the State on the merits, we do not consider whether defendant forfeited them. Where there is no error, there can be no plain error.

People v. Johnson, 218 Ill. 2d 125, 139 (2005). For the same reason, we must reject defendant's contention that his trial counsel was ineffective; counsel could not have been ineffective for failing to object to admissible evidence. *People v. Edwards*, 195 Ill. 2d 142, 165 (2001) (holding that defense counsel is not ineffective for failing to make a fruitless argument).

¶ 18 On the merits, defendant first argues that allowing Bell to testify about the DNA report prepared by Cellmark violated his Sixth Amendment right of confrontation because Bell did not actually conduct the testing of the cellular material found on the sweatshirt and no one from Cellmark testified at trial.

¶ 19 The Sixth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right *** to be confronted with the witnesses against him." See U.S. Const., amends. VI, XIV; see also Ill. Const. 1970, art. I, § 8; *Crawford,* 541 U.S. at 54; *Pointer v. Texas,* 380 U.S. 400 (1965) (holding that the confrontation clause is applicable to the states via the fourteenth amendment). Under the confrontation clause, the testimonial hearsay statements of a witness who is unavailable at trial may not be admitted against a criminal defendant unless the defendant had a prior opportunity for cross-examination. *People v. Patterson*, 217 Ill. 2d 407, 423 (2005) (citing *Crawford*, 541 U.S. at 68).

¶ 20 However, despite the evidentiary constraints imposed in *Williams*, a majority of the Supreme Court later held that it was constitutionally permissible to admit DNA evidence in the manner done here. *Williams v. Illinois*, 567 U.S. ___, 132 S. Ct. 2221 (2012) (plurality op.). A few months later, the Illinois supreme court harmonized the fractured holdings of *Williams* and

Crawford in *People v. Leach*, 2012 IL 111534 (hereinafter *Leach*). In *Leach,* the defendant was convicted of the first degree murder in the strangling death of his wife. *Id.* ¶¶ 1-3. The autopsy report on the victim was admitted into evidence through the expert testimony of a medical examiner who had not performed the autopsy but had reviewed the autopsy report in forming her opinion on the cause of death. *Id.* ¶ 1. The appellate court affirmed the conviction, and defendant further appealed to the supreme court. *Id.*

¶ 21 The *Leach* court addressed whether the medical examiner's testimony and the autopsy report she relied upon violated the defendant's confrontation clause rights. *Id.* ¶ 50. The court stated that, although the *Crawford* court "merely noted *** that business records will rarely implicate the confrontation clause because they are prepared in the routine course of the operation of the business activity or public office or agency, rather than for the purpose of admission against a criminal defendant," "[t]his does not mean *** that a business record or public record can never be testimonial." *Id.* ¶ 81.

¶ 22 The *Leach* court then undertook an extensive examination of numerous decisions from the United States Supreme Court on this issue, including *Crawford*, *Williams, Davis v. Washington*, 547 U.S. 813, 822 (2006), *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), *Michigan v. Bryant*, 562 U.S. ___, 131 S. Ct. 1143 (2011), and *Bullcoming v. New Mexico*, 564 U.S. ___, 131 S. Ct. 2705 (2011). *Leach*, ¶¶ 77-135. Noting at one point the need to provide a "scorecard" to reconcile the various plurality opinions, partial concurrences, and partial dissents (*Id.* ¶ 105), our supreme court expressed hope that the "split of opinion and *** confusion *** may eventually be resolved by the United States Supreme Court" (*Id.* ¶ 136). Nonetheless, the

Leach court held that "under the objective test set out by the plurality in *Williams* [*i.e.*, whether the primary purpose was to accuse a targeted individual of criminal conduct], under the test adopted in *Davis* [whether the primary purpose was to provide evidence in a criminal trial], and under Justice Thomas's 'formality and solemnity' rule [finding affidavits, depositions, confessions, and prior testimony subject to *Crawford*], autopsy reports prepared by a medical examiner's office in the normal course of its duties are nontestimonial," even those reports that are prepared by a medical examiner who is "aware that police suspect homicide and that a specific individual might be responsible." *Id.* ¶ 137.

¶ 23 In our view, the holding in *Leach* controls this issue. Here, as in *Leach*, the DNA report on the sweatshirt was prepared by Cellmark, and Bell testified as to the contents of that report, and relied on it in formulating her opinion as to the provenance of the sweatshirt. There was no testimony at trial that anyone from Cellmark ever had any material or information regarding Williams's DNA, nor that Cellmark prepared the report "for the primary purpose" of targeting Williams. See *id.* ¶ 130. Likewise, there was no evidence that Cellmark's DNA report was certified nor sworn to. See *id.* ¶ 131. Thus, the DNA report here lacks the "formality and solemnity of an affidavit, deposition, or prior sworn testimony" and does not trigger *Crawford*. *Id.*; see also *Michigan*, 562 U.S. at ___, 131 S. Ct. at 1167 (Thomas, J., concurring in the judgment).

¶ 24 The defendant contends that the opinion in *Williams* is so fractured that there is still no solid jurisprudential framework holding that DNA can be admitted through the testimony of a witness like Bell. However, in the relatively short period of time since *Williams* and *Leach* were

handed down, this court has consistently held that DNA analyses are admissible in the manner done here. See *People v. Negron*, 2012 IL App (1st) 101194, ¶¶ 59-61; *People v. Kendrick*, 2013 IL App (1st) 090120-B, ¶ 21; *People v. Nelson*, 2013 IL App (1st) 102619, ¶ 62. Accordingly, the forfeiture issue is moot and defendant's first argument is unavailing.

¶ 25 In his second and third arguments, the defendant claims that the State failed to establish a chain of custody for the swabs from the sweatshirt sent to Cellmark for DNA testing and that there was an insufficient foundation for the DNA results because of a lack of evidence that Cellmark employed measures to protect the tested samples against contamination.

¶ 26 At trial, the chain of custody and foundation for the DNA evidence was established through the testimony of Karaffa, Bell, and Officer Davis, and through two stipulations in which the defendant, through counsel, agreed that the swab "was sealed and a proper chain of custody was maintained at all times." See *supra* at ¶ 13.

¶ 27 At trial, defense counsel argued that the State had not met its burden of proof. In particular, defendant argued that the defendant could have been the donor of the minor DNA profile found on the sweatshirt, and that there was a gap in the evidence with respect to what happened to the sweatshirt swabs once they were sent to Cellmark. However, defendant's argument fails in light of the unrebutted testimony regarding the preservation of the swabs and the chain of custody. Our supreme court has held that a "sufficiently complete chain of custody does not require that every person in the chain testify, nor must the State exclude every possibility of tampering or contamination[.]" *People v. Woods*, 214 Ill. 2d 455, 467 (2005).

¶ 28 The *Woods* court also stated:

> "The character of the item sought to be introduced into evidence determines which method of establishing a foundation must be employed. [Citations.] For example, where an item has readily identifiable and unique characteristics, and its composition is not easily subject to change, an adequate foundation is laid by testimony that the item sought to be admitted is the same item recovered and is in substantially the same condition as when it was recovered. [Citations.]
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> ***. Unless the defendant produces evidence of actual tampering, substitution or contamination, a sufficiently complete chain of custody does not require that every person in the chain testify, nor must the State exclude every possibility of tampering or contamination; the State must demonstrate, however, that reasonable measures were employed to protect the evidence from the time that it was seized and that it was unlikely that the evidence has been altered." *Id.* at 466-67.

Additionally, two witnesses tied the same inventory number to the swabs. Here, because defendant points to no hard evidence that the exhibits were tampered with or contaminated and his argument relies entirely on speculation, there is no basis for us to disturb the verdict below.

¶ 29 Defendant's third similar point attempts an end run around the Supreme Court's ruling in *Williams*. Defendant maintains there was an insufficient foundation for Bell's conclusions

because she did not specifically testify that Cellmark's equipment was "calibrated and functioning properly." Defendant then bootstraps that point into an ineffective assistance of counsel claim. However, this is merely a different formulation of the confrontation clause issue we address above. Bell's testimony provided a sufficient, although rather terse, explanation of Cellmark's involvement, and any deficiencies therein went to the weight of the evidence, not its admissibility. As the Supreme Court stated in *Williams*: "there is no suggestion that anyone at Cellmark had a sample of [the defendant's] DNA to swap in by malice or mistake. And given the complexity of the DNA molecule, it is inconceivable that shoddy lab work would somehow produce a DNA profile that just so happened to have the precise genetic makeup of [the defendant], who just so happened to be picked out of a lineup by the victim. The prospect is beyond fanciful." *Williams*, 567 U.S. at ___; 132 S. Ct. at 2244.

¶ 30 CONCLUSION

¶ 31 For these reasons, we affirm the convictions of the defendant.

¶ 32 Affirmed.